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No.

IN THE

Supreme Court of the United States

SHIRLEY METZ,

Petitioner,

vs

TOOTSIE ROLL INDUSTRIES, INC., and LOCAL UNION NO. 1, BAKERY, CONFECTIONARY AND TOBACCO WORKERS' INTERNATIONAL UNION OF AMERICA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner, Shirley Metz, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 16, 1983.

QUESTIONS PRESENTED FOR REVIEW

(1) What conduct on the part of a union triggers the six-month limitations period within which an employee must bring suit for breach of the union's duty of fair representation.

(2) At what point in time should an employee become aware that union inaction on her grievance constitutes a breach of the union's duty of fair representation.

(3) Does a union's inaction in processing a grievance amount to a continuing violation of the union's duty of fair representation.

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OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 715 F. 2d 299 (7th Cir. 1983). It also appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 16, 1983. No petition for rehearing was filed. This petition for certiorari was filed within 90 days of the date of the entry of the Court of Appeal's opinion. The Court's jurisdiction is invoked under 28 U. S. C. 1254(1).

STATEMENT OF THE CASE

Plaintiff filed her complaint against Tootsie Roll Industries, Inc., her former employer, and Local No. 1 of the Bakery, Confectionary and Tobacco Workers, her union, on June 23, 1982. She filed a two count complaint alleging in Count I that under Section 301 of the Labor Management Relations Act, 29 U. S. C. Section 185, she was terminated by her employer in violation of the collective bargaining agreement then in effect and that her union violated its statutory duty of fair representation. Count II of the complaint alleged that her discharge was in retaliation for seeking enforcement of certain statutory rights under the Illinois Workers Compensation Act, Ill. Rev. Stat., 1981, ch. 48, Section 138.1 *et seq.*

Upon her discharge, the plaintiff notified the respondent union that she believed her discharge was in violation of her contractual and statutory rights and requested that these rights be enforced under the collectively bargained grievance procedure. On May 5, 1981, the union notified the respondent company that plaintiff's rights were violated under the applicable collective bargaining agreement and demanded that plaintiff be reinstated. Plaintiff alleges that no further action has been taken by the respondent union on her behalf since that date, even though the union continued to acknowledge that the employer violated the terms and conditions of the collective bargaining agreement and even though the collective bargaining agreement expressly provided that all cases of discharge shall be subject to the grievance procedure. The complaint went on to allege in Count I that the defendant union has failed to initiate and process the grievance or take any other affirmative action on her behalf. Petitioner also alleged that the defendant union gave no reason for its inaction, nor did it ever notify her that it would not proceed with the processing of her grievance. On June 7, 1982, the union's attorneys wrote

petitioner's counsel regarding the prospects of resolving Metz's grievance.[1] Petitioner filed suit a short time later.

Count II of the petitioner's complaint alleged a statutory cause of action under Illinois law. The jurisdictional allegations of Count I were incorporated by reference and in addition, the complaint alleged that jurisdiction was pendent to Count I. The complaint further alleged in Count II that petitioner was discharged on January 15, 1981, in retaliation for exercising her rights under the Workers Compensation Act. Ill. Rev. Stat., 1981, ch. 48, Section 138.1 *et seq.* Ms. Metz went on to allege that she was discharged while still under doctor's care and temporarily totally disabled and said discharge was not for just cause as required in the collective bargaining agreement, but in retaliation for the exercise of her statutory rights under the Workers Compensation Act.

The respondents both filed motions to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that the federal law claims were barred by the applicable statute of limitations. The respondents sought dismissal of the state claim for lack of pendent jurisdiction, given the motion to dismiss in the federal action. The district court granted the motions to dismiss. Petitioner filed a motion to reconsider and clarify the dismissal order which was denied.

An appeal was then taken to the Seventh Circuit Court of Appeals. On appeal, the petitioner argued that her complaint was timely filed because no final decision concerning her grievance had been made by either the union or the employer, nor had any decision regarding this grievance ever been communicated to her. Additionally, Metz contended that the

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[1] This letter was not a part of the original record. Petitioner moved to supplement the record to include this document. This motion was granted. 715 F. 2d 299, 300. A copy of this letter is enclosed in the Appendix.

union's inaction concerning the processing of her grievance constituted a continuing violation of its duty of fair representation.

On August 16, 1983, the Seventh Circuit affirmed the district court's dismissal. Relying upon the decision in *DelCostello* vs *International Brotherhood of Teamsters*, ____ U. S. ____, 113 LRRM 2737 (1983), the court held that the statute of limitations to be applied in this case is the six month limitations period provided by Section 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b). The court went on to hold that the petitioner should have realized the union was taking no action on her behalf and actual notification by the union to petitioner as to refusal to process her claim was not necessary. Additionally, the court found that inactivity regarding petitioner's grievance did not amount to a continuing violation of its duty of fair representation. Petitioner's § 301/fair representation suit was thus held to be time-barred.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I.

THE LIMITATIONS PERIOD IN AN ACTION FOR BREACH OF THE DUTY OF FAIR REPRESENTATION SHOULD BEGIN TO RUN WHEN THE EMPLOYEE ACTUALLY BECOMES AWARE OF THE UNIONS BREACH

An employee seeking any remedy against his employer for an alleged breach of a collective bargaining agreement is ordinarily required to attempt to exhaust any grievance or arbitration procedures found in the bargaining agreement prior to filing suit. *Republic Steel Corp.* vs *Maddox,* 379 U.S. 650, 652-653 (1965), *Clayton* vs *Automobile Workers,* 451 U.S. 679 (1981). However, if it is alleged that the union representing the employee in the grievance/arbitration procedure, breaches its duty of fair representation, an employee may bring suit against both the employer and the union, notwithstanding the outcome of the grievance procedure. *Vaca* vs *Sipes,* 386 U.S. 171 (1967), *Hines* vs *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976), *United Parcel Service, Inc.* vs *Mitchell,* 451 U.S. 56 (1981).

Until recently, the appropriate limitations period to be applied in § 301/fair representation cases has been the subject of differing views. However, in *DelCostello* vs *International Brotherhood of Teamsters,* ____ U.S. ____, 113 LRRM 2737 (1983), this Court concluded that § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) should be applied in such cases. As a result, an employee bringing a hybrid § 301/fair representation suit has six months within which to bring his action. The question becomes when does this six month time period begin to run in fair representation cases.

Petitioner does not dispute the fact that a basic federal concept underlying Section 301 substantive law requires deference to the voluntary contractual grievance procedures for

the settlement of labor management disputes in a quick and timely manner. See, e.g., *United Steelworkers* vs *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 4 L.Ed.2d 1424, 80 S.Ct. 1358 (1960), *United Steelworkers* vs *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L.Ed.2d 1409, 80 S.Ct. 1347, (1960), *United Steelworkers* vs *American Manufacturing Co.*, 363 U.S. 564, 4 L.Ed.2d 1403, 80 S.Ct. 1363 (1960). However, it must be remembered in such cases that the dispute resolution process is tripartite in nature, with the union, employer and the employee all having a significant stake in the outcome. Just as the union and employer are entitled to an expeditious and final resolution of labor-management disputes, so is the employee. This Court characterized the employees status with regard to the grievance procedure in the following manner:

> In the labor setting, by contract, the employee will often be unsophisticated in collective bargaining matters, and he will almost always be represented solely by the union. He is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not at issue in the arbitration proceeding, and to frame his suit. *DelCostello, supra,* 113 LRRM at 2742.

In both of the major cases to date dealing with the limitations issue, *DelCostello* and *Mitchell, supra,* as well as those from the Seventh Circuit, *Davidson* vs *Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981); *Hall* vs *Printing and Graphic Arts Union Local No. 3*, 696 F.2d 494 (7th Cir. 1982); and *Stevens* vs *Gateway Transportation Company*, 696 F.2d 500 (7th Cir. 1982), the employee had actual knowledge of the decision that was made with regard to his grievance. In the present case, it is undisputed that the respondent union never communicated to the petitioner that it would not proceed any further on her behalf. Moreover, the union initially indicated to the petitioner that her grievance had merit. Taken on its face, the complaint indicates that the petitioner never was informed of the status of her grievance. Given the liberal rules of pleading, especially in fair representation cases, and the fact

that all well-pleaded facts are taken as true on a motion to dismiss under Rule 12(b), the complaint states a timely cause of action. See *Conley* vs *Gibson*, 355 U.S. 41 (1975).

The Seventh Circuit has held in this case that failure to file a grievance has the same finality effect of a final decision in a grievance or arbitration proceeding. 715 F. 2d at 303. While that may or may not be the case, the union's failure or refusal to process should at least be required to be communicated to the employee. Anything less puts the employee in the position of being a mind reader as to the union's unexpressed intentions. The respondent union admits that it sent a letter to the employer regarding the merits of plaintiff's reinstatement. There is nothing in the record to indicate that its position has ever changed. Yet somehow, it is held that the petitioner is supposed to know that the union really wasn't going to take any action on her behalf and a lawsuit would be necessary.

To hold that absent some reasonable indication from the union an employee is presumed to know that a breach of the duty of fair representation has taken place, unjustly imposes a greater burden upon the aggrieved employee in such cases. As noted by the Court in *DelCostello, supra:*

> The union's breach of duty may consist of a wrongful failure to pursue a grievance to arbitration, as in *Vaca* and *Bowen*, or a refusal to pursue it through even preliminary stages. The parallel to vacation of an arbitral award seems tenuous at best in these situations; it is doubtful that many state arbitration statutes would themselves cover such a case in a commercial setting. Yet if it were thought necessary to apply different state rules to these different possibilities, the result would be radical variation in the treatment of cases that are not significantly different with regard to the principles of *Vaca, Hines,* and *Mitchell.* Moreover, the difficulty of detecting and mustering evidence to show the union's breach of duty may be even greater in these situations, and it may not be an easy task to ascertain when the cause of action accrues. 113 LRRM at 2742 f.n. 16.

Cases involving unfair labor practice charges under Section 10(b) of the NLRA (the appropriate limitations period to be applied), lend credence to petitioner's argument. The courts have held that under § 10(b) the limitations period does not begin to run until the alleged unlawful activity has become known to the charging party. *NLRB* vs *Duncan Foundry & Machine Works, Inc.*, 435 F. 2d 612 (7th Cir. 1970), *NLRB* vs *Allied Products Corp.*, 548 F. 2d 644 (6th Cir. 1977), *NLRB* vs *Shawnee Industries, Inc.*, 333 F. 2d 221 (10th Cir. 1964). Since no final determination has been made with regard to this grievance, the six-month limitations period has not yet commenced.

II.

IT WAS REASONABLE FOR THE PETITIONER TO BELIEVE THAT THE UNION WAS ACTING ON THE PETITIONER'S BEHALF

The Court of Appeals in this case applied the general rule that the limitations period begins to run when the claimant discovers, or in the exercise of reasonable diligence should have discovered the alleged violation. *Hungerford* vs *United States*, 307 F. 2d 99, 102 (9th Cir. 1962). The court went on to hold that under *Hungerford*, the petitioner should have discovered the acts giving rise to the alleged breach at some point in time prior to six months before suit was filed. According to the holding, the petitioner should have known that under the provisions of the contract the time to elect arbitration had arrived in late February or early March, 1981. Yet it is undisputed that in May 1981, the respondent union, in a letter to Tootsie Roll, stated the union's position that Tootsie Roll's action violated the plaintiff's rights under the terms of the collective bargaining agreement. The court's interpretation here would allow a union to shift the burden of proceeding by doing nothing. If it does nothing long enough it will be absolved of any liability because of its breach of its duty of fair

representation. Finality in the dispute resolution process at the workplace involves all three parties in equal measure. The court should not allow a union to delay an employee's grievance for months and then, as a result of such delay, claim that the employee's action was not timely filed.

Given the fact that the union made representations on two occasions as to actions it would take on petitioner's behalf the scales are definitely tipped to an employee's disadvantage in holding that it is unreasonable to rely on such union representations and that legal action should have commenced.

As was stated by this court, one of the important federal policies underlying § 301 actions is the relatively rapid disposition of labor disputes. *United Parcel Service* vs *Mitchell*, supra, cite at 63, quoting *Auto Workers* vs *Hoosier Cardinal Corp.*, 383 U. S. 696, 707 (1966). This policy is undermined when a union is allowed to take no action on an employee's behalf and the employee's rights are extinguished as a result of such inaction.

III.

UNION INACTION IN PROCESSING A GRIEVANCE CONSTITUTES A CONTINUING VIOLATION OF THE UNION'S DUTY OF FAIR REPRESENTATION WHEN NOT COMMUNICATED TO THE EMPLOYEE

While a union is allowed considerable discretion in deciding which grievances to present and how to present them, it may not ignore an employee's grievance or handle it in a prefunctory manner. *Vaca* vs *Sipes, supra*, 386 U. S. at 191, *Steelworkers* vs *NLRB*, 692 F. 2d 1052 (7th Cir. 1982). Whether a union breaches its duty of fair representation will depend upon the facts of each case. *Griffen* vs *United Automobile Aerospace & Agricultural Implement Workers*, 469 F. 2d 181 (4th Cir. 1972).

There is substantial precedent to consider the union's conduct as a continuing violation of its duty of fair representation. Where impermissable activity on the part of a party can be considered continuing in nature, section 10(b) does not bar legal action even though more than six months have passed. *NLRB* vs *Basic Wire Products, Inc.*, 516 F. 2d 261 (6th Cir. 1975), *NLRB* vs *Albritton Engineering Corp.*, 340 F. 2d 281 (5th Cir. 1965). This continuing violation analysis has specifically been applied to situations where a union has refused to process grievances. *United Rubber Workers* vs *NLRB*, 368 F. 2d 12 (5th Cir. 1966). Since the union has acknowledged the fact that plaintiff's grievance has merit, its conduct in failing to resolve the matter amounts to a continuing violation of its duty of fair representation. The union's inaction on petitioner's grievance (despite its representations to the contrary) is tantamount to ignoring petitioner's grievance. This is precisely the conduct condemned by the court in *Vaca* vs *Sipes, supra.* To allow such inaction to somehow trigger an employee's cause of action, even though such inaction continues, once again shifts the burden of accountability from the union where it belongs, to the unwary and unsophisticated employee. So long as the union's failure to act on an employee's behalf is not communicated to the employee, the breach of the duty of fair representation is continuing in nature.

CONCLUSION

For all these reasons, it is respectfully requested that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-2945

SHIRLEY METZ,

Plaintiff-Appellant,

v.

TOOTSIE ROLL INDUSTRIES, INC., and LOCAL UNION NO. 1, BAKERY, CONFECTIONERY AND TOBACCO WORKERS' INTERNATIONAL UNION OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 3928—J. Sam Perry, *Judge.*

ARGUED JUNE 3, 1983—DECIDED AUGUST 16, 1983

Before WOOD and CUDAHY, *Circuit Judges,* and CELEBREZZE, *Senior Circuit Judge.**

CUDAHY, *Circuit Judge.* This appeal involves the timeliness of an action brought against an employer both for breach of a collective bargaining agreement and for retaliatory discharge and against a union for breach of its

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* Honorable Anthony J. Celebrezze, Senior Circuit Judge for the Sixth Circuit, is sitting by designation.

duty of fair representation. The district court dismissed the complaint and we affirm.[1]

I.

On June 12, 1980, while employed by Tootsie Roll Industries, Inc. ("TRI"), the appellant, Shirley Metz, was injured at work.[2] Approximately six months later, on January 15, 1981, she was discharged by TRI for failing to return to work. Appellant apparently thought that the discharge was not for just cause and, upon discharge, notified Local Union No. 1, Bakery, Confectionery and Tobacco Workers' International Union of America (the "Union"), of her grievance.

The appellant was a member of the Union and entitled to the benefits of its collective bargaining agreement with TRI. That agreement provided that management was empowered to discharge employees only for cause, that discharge cases were subject to the grievance procedure, and that all grievances had to be filed within five days.[3]

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[1] Appellant's motion to supplement the record on appeal is also hereby granted.

[2] For purposes of this appeal, the facts alleged by the appellant in her complaint are assumed to be true. *See* 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1368 (1969).

[3] The collective bargaining agreement provided, in relevant part:

> ARTICLE 7
> Stewards—Grievances—Arbitra[illegible]s
>
> • • •
>
> Section 2. In the event a grievance or dispute arises at any time over wages, hours or working conditions, the Steward upon proper notification to their immediate Department Foreman, shall be given permission to settle, and/or observe grievances. . . . All grievances must be filed within five (5) days.
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> • • •

(Footnote continued on following page)

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[3] *continued*

In the event the dispute or grievance has not been satisfactorily settled within three (3) working days, the Director of Human Resources or his designated representative shall give his answer in writing within five (5) days thereto, to both the employee and his Shop Steward, or the employee and the Business Representative, as the case may be.

Section 3. In the event the dispute or grievance has not been satisfactorily settled between the above parties, it shall, within five (5) days, be presented in writing to the President of Local Union No. 1, Bakery, Confectionery and Tobacco Workers International union, AFL-CIO-CLC, or his designated representative, and the Vice-President in Charge of Manufacturing Operations, and the International Representative of the BC&T, AFL-CIO-CLC in attendance.

Within five (5) days thereafter, a meeting between the President of Local No. 1, BC&T, AFL-CIO-CLC, or his designated representative and the Business Representative of the Union who services the employees who presented the grievance, and the Director of Human Resources and the Director of Labor Management Relations of the Company, or his designated representative and the aforesaid Production Manager, Director of Engineering, or Warehouse Manager, as the case may be, or his designated representative, shall be held in an attempt to settle the grievance.

(a) If a satisfactory settlement cannot be obtained, the matter will be left to arbitration. No individual employee or member shall have the right to invoke arbitration without written consent of the Union. If such written consent is refused, the employee shall have no further recourse to the Company or the Union.

* * *

ARTICLE 8
Discharge

* * *

Section 2. If the Union finds after investigation that the employee has been discharged or laid off without cause, and that it cannot reach an adjustment after exhausting the grievance procedure, it may refer the case to the Arbitration Board for decision.

The Union failed to take action to initiate the grievance procedure. The only action it apparently took in the matter was to write a letter to TRI on May 5, 1981, stating that the appellant's discharge was in violation of the collective bargaining agreement. Although Metz alleged that she repeatedly complained, the Union failed to process her grievance. The Union has not taken any further action from May 5, 1981, to the present.

Metz filed this suit against TRI and the Union, the defendants-appellees, on June 23, 1982, in the district court for the Northern District of Illinois. The complaint alleged both federal and state law claims. The state law claim was cognizable only under the district court's pendent jurisdiction. The federal law claims include both a claim against the Union for breach of its duty of fair representation and a claim against TRI for breach of the collective bargaining agreement under § 301 of the Labor Management Relations Act, 29 U.S.C. § 195. The state law claim is based upon the allegedly retaliatory discharge of the appellant by TRI for filing a workmen's compensation claim under the Illinois Workmen's Compensation Act.

The appellees filed motions to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and argued that the federal law claims were barred by the applicable statute of limitations. TRI gave two reasons for dismissal of the state law action. The first was a lack of pendent jurisdiction given the dismissal of the federal action. The second was based on documents attached to the motion to dismiss which indicated that the appellant did not file a claim for workmen's compensation until *after* she was discharged.

The district court dismissed the entire complaint with prejudice for "reasons set forth in the defendants'[-appellees'] memoranda." Plaintiff-appellant's motion to the district court to reconsider and clarify was denied and this appeal ensued.

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II. *The Federal Law Claims*

A. *Applicable Statute of Limitations*

A suit by an employee against a union for breach of the duty of fair representation and an action against an employer under § 301 of the Labor Management Relations Act for breach of the collective bargaining agreement are inextricably interdependent. "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-71 (1976). Because these cases are not expressly governed by any federal statute of limitations, the appropriate statute of limitations to apply to this section 301/fair representation claim has been the subject of dispute.[4] The Supreme Court, however, in *DelCostello v. Inter-*

[4] Until *DelCostello v. International Brotherhood of Teamsters*, 51 U.S.L.W. 4693, 4697 (1983), federal courts generally applied state statutes of limitations to these federal claims. *See United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 (1981). In *Mitchell*, the Court was presented with the problem of determining the appropriate state statute of limitations to apply to an employee's action against his employer under § 301. *Id.* at 58. The Court determined that the employee's suit was "... more analogous to an action to vacate an arbitration award than to a straight contract action." *Id.* at 62. Therefore, the Court held that the most appropriate state statute of limitations to apply was that used in actions to vacate arbitration awards. *Id.* at 64. In Illinois, a 90-day statute of limitations applies to this type of case. ILL. REV. STAT. (1981), ch. 10, Section 112(b).

The employee's claim against the *union* was not addressed by the *Mitchell* case, however, because only the employer sought *certiorari*. *Id.* at 60. Claims of this sort against unions have been given a treatment somewhat different than *Mitchell* by the lower federal courts. Thus, the Seventh Circuit has stated that:

> This Circuit, other federal Circuits, and the National Labor Relations Board have all held that breach by a labor union of its statutory duty of fairly representing members is an unfair labor practice under the National Labor Relations Act.

(Footnote continued on following page)

national Brotherhood of Teamsters, 51 U.S.L.W. 4693, 4697 (1983), has recently clarified the appropriate treatment of this issue. *DelCostello* involved a suit arising out of a discharge by the terminated employee against the employer and the union.[5] The employee alleged that his discharge was in violation of the collective bargaining agreement and that the union had not represented him fairly in the grievance procedure. *Id.* at 4694. The district court applied Maryland's 30-day statute of limitations for actions to vacate arbitration awards to both the claim against the employer and the claim against the Union. *Id.* With respect to the appropriate statute of limitations to apply in these actions, the Supreme Court said:

> In *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), we held that a similar suit was governed by a state statute of limitations for vacation of an arbitration award, rather than by a state statute for an action

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[4] *continued*

Hall v. Printing and Graphic Arts Union, Local No. 3, 696 F.2d 494, 498 (7th Cir. 1982). Therefore, this court applied to fair representation claims the limitation period for unfair labor practice complaints before the National Labor Relations Board. *Id.* The applicable statute states in pertinent part:

> *Provided* . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

§ 10(b) National Labor Relations Act, 29 U.S.C. § 160(b).

[5] The Court decided *United Steelworkers of America, AFL-CIO-CLC v. Flowers*, with *DelCostello* due to the similarity of issues. *Flowers* also involved a suit against an employer for breach of the collective bargaining agreement and against a union for breach of the duty of fair representation. The Second Circuit applied New York's 90-day statute of limitations for vacation of arbitration awards to the claim against the employer. It then applied New York's three-year statute of limitations for malpractice actions to the claim against the union. The Supreme Court reversed with respect to both claims.

> on a contract. We left two points open, however. First, our holding was limited to the employee's claim against the employer; we did not address what state statute should govern the claim against the union Second, we expressly limited our consideration to a choice between two *state* statutes of limitations, we did not address the contention that we should instead borrow a *federal* statute of limitations, namely, § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). These cases present these two issues. We conclude that § 10(b) should be the applicable statute of limitations governing the suit, both against the employer and against the union.

DelCostello, 51 U.S.L.W. at 4694 (emphasis in original) (footnotes omitted). Therefore, the statute of limitations to be applied in the case before us is the six month statute of limitations provided by section 10(b) of the National Labor Relations Act.[6] *See Storck v. International Brotherhood of Teamsters*, Nos. 82-1925, 82-1926 (7th Cir. July 25, 1983).

B. *Is This Action Barred By The Statute of Limitations?*

The appellant contends that the statute of limitations does not bar her § 301/fair representation claim. Appellant's first argument in support of this contention is

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[6] Appellant also argues that the allegation of a cause of action based upon state law requires application of the five year statute of limitations period which Illinois law provides for the state law claim to all claims in the case. This contention has no merit. Appellant forgets that the complaint alleged two independent claims. One claim was a federal law claim which was a hybrid § 301/fair representation claim. As discussed above, the section 10(b) limitation period applies to this claim. The other claim was a pendent state law claim. The reliance upon the state statute of limitations for this second claim does not affect the appropriate statute of limitations to be applied to the federal claim.

that the statutory period still has not begun to run because no "final determination" has been made of her grievance.[7]

In *Hall v. Printing and Graphic Arts Union, Local No. 3*, 696 F.2d 494 (7th Cir. 1982), the plaintiff informed the union of her discharge and the union initiated discussions with the employer. The union refused to take the grievance to arbitration and notified the plaintiff that it would pursue her grievance no further. *Id.* at 496. In discussing the union's refusal to take the grievance to arbitration in connection with the issue of the appropriate statute of limitations to be applied to the employee's claim against the employer, we said:

> Nothing in the language of the collective bargaining agreement convinces us that decisions by the Local not to pursue an employee's grievance all the way to arbitration are any less final or reliable than arbitration awards.

Id. at 497.

In the case before us, the appellant has alleged that under the collective bargaining agreement all cases of discharge are subject to the grievance procedure, that all grievances must be filed within five days and that the Union failed to initiate the grievance procedure. We believe, therefore, that under the language of the collective bargaining agreement, the failure and refusal of the Union to file the grievance within the specified time amounted to a final decision. This case, therefore, falls within the quoted language of *Hall* in that, under the collective bargaining agreement, the failure to file the grievance had the same finality effect as an arbitration award.

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[7] Appellant's contention that the statute has not yet begun to run raises the interesting issue whether any cause of action has yet accrued to the appellant. That is, the point at which the cause of action would normally accrue is the same point at which a statute of limitations would begin to run. We need not address this argument, however, due to our resolution of the case.

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In *Bigbie v. Local 142, International Brotherhood of Teamsters*, 530 F. Supp. 402, 404 (N.D. Ill. 1981), the plaintiffs requested that the union file a grievance on their behalf, but the union refused. The plaintiffs sought to have a different statute of limitations applied than that for vacation of an arbitration award because there had been no final and binding decision arising from an adjudication. *Id.* at 405. The court, in rejecting the plaintiffs' contention stated:

> From the employee's viewpoint a union's refusal to launch the grievance procedure is just as "final and binding" as a refusal to carry forward a grievance at any point after the procedure has been invoked.

Id. From the viewpoint of the plaintiff in the case at hand, therefore, the alleged "refusal and failure" of the Union to act amounted to a final determination.

The appellant next argues that, even if the Union's alleged failure and refusal to take any further action did give rise to a cause of action, the statute still has not begun to run because neither defendant has informed her about the outcome of her request for the filing of a grievance. Both parties note the general rule that the limitations period begins to run "... when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]." *Hungerford v. United States*, 307 F.2d 99, 102 (9th Cir. 1962); *see also N.L.R.B. v. Dan Burgess Construction Corp.*, 596 F.2d 378, 382 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). This case falls within the "should have discovered" prong of the *Hungerford* rule. At some point prior to six months preceding the time this action was brought, the appellant, in the exercise of reasonable diligence, should have discovered the acts constituting the alleged violation.

The violation alleged against the Union was a breach of its duty of fair representation by its failure and refusal to take any action on behalf of the appellant. This inactivity on the part of the union should have been discovered by the appellant prior to the six-month period preceding the initiation of this action. The appellant was discharged on January 15, 1981. Upon her discharge she notified the un-

ion, but the union failed to file a grievance within the five-day limitation under the collective bargaining agreement. The appellant has not alleged that she was misled by the Union as to its activities. As TRI points out, once a grievance has been filed within the required five day period, the contract requires it to be processed through various stages, up to arbitration, until a final decision is reached, which would bind the employee. The contractual provisions call for these proceedings to be exhausted, if the Union does not take the matter to arbitration, in approximately 23 days. Appellant knew, or at least should have known, that under the provisions of the contract the time to elect arbitration had arrived in late February or early March, 1981.

The appellant also alleges that she repeatedly requested the Union to process her grievance and the Union "failed and refused." It is uncontested that from May 5, 1981, until the present, the Union took no action at all. Since this action was brought on June 23, 1982, almost seven months of Union inactivity preceded the six month statutory period. At some point prior to the six month statutory period, the appellant should have realized that the Union was taking no action on her behalf. The appellant cannot be allowed to sit back and claim a lack of notice in light of circumstances such as these. Since the alleged violation, which consisted of Union inactivity, should have been discovered by a reasonably diligent claimant prior to the statutory period, the *Hungerford* test is satisfied.

This result is consistent with the strong federal policy favoring the prompt resolution of labor disputes. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63 (1981).

> To choose a limitations rule in this case is to strike a balance between the right of an ex-employee to seek legal redress for an unlawful discharge from employment and the rights of an employer to be free of the risk of forever having to make salary payments to discharged employees and of the public to be free of the disruptive effects of lingering instability in labor relations.

Hall, 696 F.2d at 497.

We recognize, of course, that the Union should be encouraged to promptly notify the employee of its decision to pursue, or not to pursue, his or her claim and that this prompt action will help preserve any legal remedies available to the employee. To say, however, that the running of the statute of limitations will be postponed indefinitely until actual notification is received from the Union or the employer, would be contrary to the policy of prompt resolution. Lack of notification would leave claims unresolved indefinitely and leave the procedure open to all of the vices which statutes of limitations were intended to eliminate.

The appellant's final contention is that the Union's conduct constituted a continuing violation of its duty of fair representation. In *Local Lodge No. 1424, International Association of Machinists v. N.L.R.B.*, 362 U.S. 411 (1960) ("*Bryan Manufacturing*"), the Court set out the basic principles to be followed in applying the section 10(b) limitation period in light of the continuing violation doctrine.

In *Bryan Manufacturing*, the General Counsel's complaints alleged that the execution of the collective bargaining agreement involved an unfair labor practice and, consequently, that the continuing enforcement of that agreement was illegal. *Id.* at 414. The execution of the agreement occurred more than six months prior to the filing and serving of the complaints. *Id.* But the Board contended that the execution and the enforcement of the bargaining agreement constituted independent unfair labor practices. *Id.* at 415. Even though the Board conceded that the statute of limitations (§ 10(b)) barred any complaint based upon the execution of the agreement, it contended that evidence as to the execution was admissible and relevant to determining whether conduct within the limitation period was unlawful. *Id.*

The Court, in *Bryan Manufacturing*, held that the General Counsel's complaints were time-barred. *Id.* The Court rejected the Board's contention about the significance of the earlier events by distinguishing two alternative situations:

> The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally dufunct unfair labor practice.

Id. at 416-17 (footnote omitted). The Court stated that the General Counsel's complaints fell in the second category. *Id.* at 417. The Court then went on to say:

> The applicability of these principles cannot be avoided here by invoking the doctrine of continuing violation. It may be conceded that the continued enforcement, as well as the execution, of this collective bargaining agreement constitutes an unfair labor practice, and that these are two logically separate violations, independent in the sense that they can be described in discrete terms. Nevertheless, the vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed but unlawfully administered .... In any real sense, then, the complaints in this case are "based upon" the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing *violation* solely by reason of circumstances existing only at the date of execution.

Id. at 422-23 (emphasis in original).

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Thus the outcome in *Bryan Manufacturing* and the discussion in that case of the doctrine of continuing violation in the § 10(b) context indicate that the appellant's reliance upon this doctrine is misplaced. In her complaint, the appellant alleges "[t]hat the defendant Union failed and refused to take any further action on the Plaintiff's discharge from May 5, 1981 to the present." In her brief on appeal, the appellant states: "Since the union has acknowledged the fact that plaintiff's grievance has merit (R. 5, 127), its conduct in failing to resolve the matter amounts to a continuing violation of its duty of fair representation."

Since nothing other than union inactivity is alleged to have occurred since May 5, 1981, which is more than six months prior to the time this action was brought, the principles set out in *Bryan Manufacturing* bar the bringing of this action. That is, even if it is conceded that the Union's inactivity constituted a continuing unfair labor practice, it is only an unfair labor practice by reason of circumstances existing at or before May 5, 1981. The Union's inactivity in the instant case, like the enforcement of the bargaining agreement in *Bryan Manufacturing*, is, absent its earlier dereliction, lawful conduct. If this court were to permit the cloaking of this inactivity with illegality by invoking events which occurred more than six months prior to the bringing of this action, it would in effect be reviving a legally non-cognizable unfair labor practice.

Appellant cites *J. Ray McDermott and Co., Inc. v. N.L.R.B.*, 571 F.2d 850 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978) and *N.L.R.B. v. Basic Wire Products, Inc.*, 516 F.2d 261 (6th Cir. 1975), for the proposition that one need only file a complaint within six months of any one refusal "to perform certain functions." These cases, however, are not apposite here.

Both *McDermott* and *Basic Wire* involve the refusals of employers to bargain with unions. *J. Ray McDermott and Co., Inc.*, 571 F.2d at 858; *Basic Wire Products, Inc.*, 516

F.2d at 262. In each case, there was a specific instance within the six months prior to the time the action was brought in which the employer was actually approached and it refused to bargain. *J. Ray McDermott and Co., Inc.*, 571 F.2d at 858; *Basic Wire Products, Inc.*, 516 F.2d at 263. In each case, the court stated that the employer was under a duty to bargain and that each refusal, in and of itself, was a violation of that duty. *J. Ray McDermott and Co., Inc.*, 571 F.2d at 858; *Basic Wire Products, Inc.*, 516 F.2d at 268. In each case, the court required that the complaint be filed within six months of one such refusal.

McDermott and *Basic Wire* are inapplicable to the instant case for two reasons. First, in the case before us, there is no specific instance of refusal alleged to have occurred within the six months preceding the filing of this complaint. Only union inactivity is alleged. Second, in both *McDermott* and *Basic Wire*, the courts brought the cases within *Bryan Manufacturing* by finding that the specific refusal to bargain when the employer was under a duty to bargain was, in and of itself, an unfair labor practice. The court in *McDermott* stated:

> Our reasoning is not controlled by a conclusory labeling of the employer's duty or of his violation as a "continuing" one. Rather, we recognize that the primary purpose of the six-month rule is to assure prompt adjudications of disputes based on fresh evidence. McDermott's refusal to bargain was based on motives contemporaneous with its refusal to bargain on April 21, 1976. The filing of the complaint on April 29, 1976 brought those motives into question, and was timely with regard to the unfair labor charge alleged.

J. Ray McDermott and Co., Inc., 571 F.2d at 858. In the case before us, it cannot be said that the Union's inactivity, in and of itself, constituted an unfair labor practice. It is similar to the enforcement problem in *Bryan Manufacturing*. Only by reference to other events can the vice in the inactivity be found. Since no other events are alleged to have occurred within the six months prior to this action, only events before that period could cloak the conduct with illegality.

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We therefore find that the appellant's federal action against the Union and, consequently, her action against the employer are time-barred, and that the appellant's section 301/fair representation claims were properly dismissed.

III. *The State Law Claim*

The second count of appellant's complaint alleges that TRI discharged her in retaliation for filing a workmen's compensation claim against TRI. Since this was a claim based upon Illinois law, the jurisdiction of the federal court could only have been pendent.

As discussed above, the federal claim, to which the state law claim was attached, was properly dismissed. Therefore, the district court properly exercised its discretion in dismissing the state law claim as well. As the Court stated in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966):

> It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants . . . Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

383 U.S. at 726 (footnotes omitted). To dismiss the state law claim with prejudice, however, required more than the pretrial dismissal of the federal claim. *Id.* at 726-27; 13 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3567 at p. 451 (1975 and 1981 Supplement). The district court based its judgment upon the reasons set forth in the defendant-appellee's memorandum in support of its motion to dismiss. Because one of TRI's two reasons for dismissal of the state law claim was simply dismissal of the federal claim, the district court must have relied upon the second reason given by TRI to dismiss with prejudice.

TRI's second argument was based upon certain documents[8] attached to its motion to dismiss.[9] These documents show that the appellant's claim for workmen's compensation was filed on January 19, 1981, and that TRI received the form of Notice to Employer on or about January 26, 1981. Since the appellant alleged that she was discharged on January 15, 1981, or four days before she filed for workmen's compensation, TRI contends that the discharge could not have been in retaliation for filing the claim. In light of the documents produced by TRI and the failure of the appellant to adequately controvert TRI's evidence, this contention is dispositive.[10]

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[8] These documents consisted of the following: An affidavit of the Director of Human Resources of TRI; A copy of an Application For Adjustment of Claim for Workmen's Compensation filed by the appellant with the Illinois Industrial Commission; A form of Notice to Employer of the filing of the appellant's claim with the Commission.

[9] Because documents outside the pleadings were provided to the court, the motion is properly considered one for summary judgment. *See* FED. R. CIV. P. 12(b).

[10] The appellant stated at oral argument that she had been receiving, prior to filing a compensation claim, some unspecified benefits from TRI because of her injury. TRI stated at oral argument that it was routine company policy to make payments to injured employees.

The appellant cites no authority and makes no argument as to why this additional fact should make a difference. Since the payment of this money was a matter of company policy and not obtained as a result of filing a claim for workmen's compensation under the Illinois Workmen's Compensation Act, it seems irrelevant to the appellant's claim as set out in the complaint.

We also note that since the district court decided this case, this court, in *Lamb v. Briggs Manufacturing, a Division of Celotex Corp.*, 700 F.2d 1092, 1093 (7th Cir. 1983), has held that Illinois law does not provide a tort cause of action for retaliatory discharge to an employee who is party to a collective bargaining agreement which only allows discharge for just cause. The appellant, in the instant case, alleged in her complaint that she was party to such an agreement (R. 2-3). Therefore, even if the contention of TRI, on which the district court based its judgment, was rejected, appellant's state law claim might still have to be dismissed with prejudice.

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The district court's decision to dismiss both claims of the appellant is therefore

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 30224—Midwest Law Printing Co., Inc., Chicago—8-16-83—400

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June 7, 1982

Donald E. Puchalski, Esq.
Doss, Puchalski, Keenan, Bargiel
& Dicks, Ltd.
20 North Wacker Drive
Suite 1823
Chicago, Illinois 60606

Re: Shirley Metz & Tootsie Roll Industries, Inc.

Dear Mr. Puchalski:

I'm sorry about the delay in responding to you. The delay was occasioned by the move of our office and the fact that Mr. Hill was out of town. I have consulted with Mr. Hill. He informs me that he has repeatedly attempted to arrange a meeting between the Union, Tootsie Roll management and Ms. Metz. Ms. Metz has not positively responded to his attempts to arrange such a meeting. However, Mr. Hill advises me that such a meeting is still available and that he had been attempting to remind Ms. Metz to arrange for her participation. In any event, if Ms. Metz will please contact Mr. Hill, he will proceed with arrangements for the meeting. I would trust that following the meeting any outstanding issues in connection with Ms. Metz's employment can be resolved.

Very truly yours,

CORNFIELD AND FELDMAN

Gilbert A. Cornfield

GAC/saf

cc: Maxie D. Hill